115—41

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1884.

No. 287.

PHILADELPHIA
BAR
ASSOCIATION

JOHN S. PIRIE, GEORGE SCOTT, ROBERT SCOTT, AND
ANDREW McLEISH, PARTNERS AS CARSON, PIRIE,
SCOTT, AND COMPANY, PLAINTIFFS IN ERROR,

vs.

EVAN J. TVEDT AND THOMAS J. TVEDT, PARTNERS AS
TVEDT BROTHERS.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE
DISTRICT OF MINNESOTA.

FILED OCTOBER 2, 1882.

16, 1880, must be, in some way, construed into a notice that it disavowed the contract?

And if this could be so, would not this reply of the plaintiffs in error, have been conclusive? "It is of no consequence what *you* did or attempted to do—*we* refused to rescind the contract or to listen to any proposition to change its obligations in any way—and, then and there we gave you fair notice that we should hold you to the delivery of the rails within the dates named in the contract of your company and *from that time to this we have not by word or act changed the position we then took in regard to the contract.*"

The plaintiffs in error are traders in the iron market. The chart of its fluctuations is always before them and in their thoughts; and it is the key to their conduct respecting this contract.

So long as iron was up they meant to keep the contract alive, and hold the Railway Company to its bond, and not until it had fallen, beyond hope of a rise, did it occur to them that it had ever been "repudiated,"

C. R. INGERSOLL,
J. W. ALLING,

of Counsel.

115-41

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1884.

No. 287.

PHILADELPHIA BAR ASSOCIATION

JOHN S. PIRIE, GEORGE SCOTT, ROBERT SCOTT AND ANDREW McLEISH, PARTNERS AS CARSON, PIRIE, SCOTT, AND COMPANY, PLAINTIFFS IN ERROR,

vs.

EVAN J. TVEDT AND THOMAS J. TVEDT, PARTNERS AS TVEDT BROTHERS.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF MINNESOTA.

FILED OCTOBER 2, 1882.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1884.

No. 287.

JOHN S. PIRIE, GEORGE SCOTT, ROBERT SCOTT AND ANDREW McLEISH, PARTNERS AS CARSON, PIRIE, SCOTT, AND COMPANY, PLAINTIFFS IN ERROR,

vs.

EVAN J. TVEDT AND THOMAS J. TVEDT, PARTNERS AS TVEDT BROTHERS.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF MINNESOTA.

INDEX.

	Original.	Print.
Writ of error	1	1
Return to writ of error	2	1
Transcript from State court	3	2
Complaint	3	2
Affidavits of non-residence	8	4
Affidavit for publication of summons	11	5
Answer of Pirie, Scott & Co.	14	6
Answer of Wood & Styles	18	8
Affidavit for garnishment	22	10
Garnishee summons	25	11
Affidavit for garnishment	28	12
Order to take disclosure (Berg)	30	13
Disclosure of J. N. Berg	31	14
Order to take disclosure (Bergoust)	33	14
Petition for removal	34	15
Bond for removal	38	17
Order of removal	41	18
Clerk's certificate	43	19

JUDD & DETWEILER, PRINTERS, WASHINGTON.

	Original.	Print.
Leave to file supplemental answer	45	19
Supplemental answer	46	19
Trial	49	21
Verdict	51	22
Order setting aside verdict and remanding	52	22
Opinion	53	23
Bill of exceptions	64	26
Assignment of errors	72	30
Order allowing writ of error, &c.	73	30
Citation	74	30
Proof of service	75	31

1 UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the judges of the circuit court of the United States for the district of Minnesota, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said circuit court, before you, or some of you, between Owen J. Tvedt and Thomas J. Tvedt, partners as Tvedt Bros., against John S. Pirie, George Scott, Robert Scott, and Andrew McLeish, partners under the firm name of Carson, Pirie, Scott & Company, defendants, a manifest error hath happened, to the great damage of the said defendants, as is said. We being willing that such error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Justices of the Supreme Court of the United States, at the Capital, in the city of Washington, together with this writ, so that you have the same at the said place, before the Justices aforesaid, on the second Monday of October next, that the record and proceedings aforesaid being inspected, the said Justices of the Supreme Court may cause further to be done therein, to correct that error, what of right and according to the law and custom of the United States ought to be done.

Witness the Honorable Morrison R. Waite, Chief Justice of the Supreme Court of the United States, this eighteenth day of July, in the year of our Lord one thousand eight hundred and eighty-two, and of the Independence of the United States the one hundred and seventh year.

[SEAL.] H. E. MANN,
Clerk of the Circuit Court of the United States of America for the District of Minnesota.

Writ of error allowed.
SAMUEL TREAT, *U. S. Judge.*

Assigned for June term of said circuit court, before whom said case was heard.

2 UNITED STATES OF AMERICA, } *ss:*
District of Minnesota, }

The answer of the judges of the circuit court of the United States for the district of Minnesota, in the eighth circuit, in within writ mentioned:

The record and proceedings, whereof mention is within made, with all things concerning the same, are hereby respectfully certified to the Justices of the Supreme Court of the United States of America, within mentioned, in a certain schedule to this writ annexed, marked "Schedule A," as within it is commanded.

Witness the Hon. Morrison R. Waite, Chief Justice of the Supreme Court of the United States of America, at Saint Paul, in the district of Minnesota, this 20th day of September, in the year of our Lord one thousand eight hundred and eighty-two, and of the Independence of the United States the one hundred and seventh year.

[SEAL.] H. E. MANN,
Clerk U. S. Circuit Court, Dist. of Minnesota.
By A. J. REYNOLDS,
Deputy Clerk.

[Endorsed :] Supreme Court of the United States. Owen J. Tvedt *et al. vs.* John S. Pirie *et al.* Writ of Error.

3 District Court, 12th Judicial District.

STATE OF MINNESOTA, *County of Chippewa:*

EVAN J. TVEDT and THOMAS J. TVEDT, Plaintiffs,
against
STYLES CARSON, JOHN T. PIRIE, GEORGE SCOTT, ROB'T SCOTT, and Andrew McLeish, copartners, as Carson, Pirie, Scott & Co., and Owen J. Wood and Theodore S. Stiles, partners, as Wood & Stiles, Defendants.

The plaintiffs allege that upon, and for some years prior to, the 16th day of February, 1881, these plaintiffs were copartners, engaged in business and doing a general merchandize business at Montevid-o, in the county of Chippewa and State of Minnesota; that the defendants first herein above named were, at said time and still are, co-partners in business under the firm name of Carson, Pirie, Scott & Co., and that during said times the defendants secondly herein above mentioned were and still are co-partners in and in business at said Montevid-o under the firm name and style of Wood & Styles; that on the 16th day of February, 1881, the said defendants, confederating together and with a malicious and unlawful design
4 and intent, had and entertained by them and each of them,
to injure, oppress, and harass these plaintiffs, and to break them up in business, wrongfully, maliciously, unlawfully, and without any reason or provocation or probable cause, caused a certain action to be commenced against these plaintiffs, in which said Carson, Pirie, Scott & Co. were plaintiffs, for the pretended recovery of money, in the district court of said Chippewa county, Minnesota, and then and there wrongfully, unlawfully, and maliciously, and with the aforesaid intent so had and entertained by each and all of said defendants, wickedly and maliciously conspired together, and without probable cause, caused to be issued out of the district court of said Chippewa county a writ of attachment upon the stock of goods, wares, and merchandize of these plaintiffs, then situate in their store at said Montevideo, and which said stock of merchandize was then and there of great value, and worth more than $12,000; that under said writ of attachment, and by direct instruction of said defendants, the sheriff of said county levied the same
5 upon the stock of goods and closed up said store, and stopped
and broke up the business of these plaintiffs.

That such proceedings were thereafter had in said cause, which was then depending in said district court of said Chippewa county. That said attachment was duly and in all things vacated, dis-olved, and that such vacation of said attachment took place on the 16th day of June, A. D. 1881. And plaintiffs further allege that the commencement of the said action and the issuance of said writ of attachment and the levy thereof upon the stock of goods of these plaintiffs was caused and done by the said defendants, and each of them, and was wrongful, malicious, and unlawful, and without any probable cause or any cause whatsoever, and was done and caused by said defendants without probable cause and with a malicious and unlawful design and intent to harass and annoy these plaintiffs and break up and ruin their said business, and for no other cause or provocation.

That at said time, to wit, the day of the levy of said attachment, these defendants were engaged in a profitable business, and that their net profits per annum of their said business amounted 6 at that time to more than $3,125.00. That by reason of said attachment these plaintiffs were compelled to expend and lay out in and about the same and in defending the same the sum of $586.55.

That by reason of said attachment the business of these plaintiffs was wholly destroyed and broken up, their said goods and property seized and carried away, and that they have never been able to resume their said business or any business.

That by reason of the premises these plaintiffs have been damaged and have suffered damage in the sum of twenty thousand dollars ($20,000), for which sum they demand judgment against the said defendants, and each of them, together with the costs and disbursements of this action.

T. F. KNAPPEN AND
O'BRIEN & WILSON,
Plaintiffs' Attorneys, Montevideo, Chippewa Co., Minn.

STATE OF MINNESOTA, } ss:
County of Chippewa, }

7 Thomas J. Tvedt came before me personally, and, being duly sworn, doth say that he is one of the plaintiffs in the above-entitled action; that the foregoing pleading is true of his own knowledge, except as to the matters which are therein stated on his information and belief, and, as to those matters, that he believes it to be true.

THOMAS J. TVEDT.

Subscribed and sworn to before me on this 17th day of August, A. D. 1881.

[SEAL.]

T. F. KNAPPEN,
Notary Public, Minn.

[Endorsed:] District court, county of Chippewa, 12th judicial district. Evan J. Tvedt *vs.* Styles Carson *et al.* Complaint. Filed this

17th day of August, A. D. 1881. Joseph D. Baker, clerk. T. F. Knappen & O'Brien & Wilson, pl'ff's' att'ys, Montevideo, Minn.

District Court, 12th Judicial District.

8 STATE OF MINNESOTA, *County of Chippewa:*

EVAN J. TVEDT and THOMAS J. TVEDT, Pl'ffs,
against
STYLES CARSON, JOHN T. PIRIE, GEO. SCOTT, ROBERT SCOTT, and Andrew McLeish, copartners as Carson, Pirie, Scott & Co., and Owen J. Wood and Theodore S. Styles, partners as Wood and Styles, def'ts, and John J. Bergoust, Garnishee.

STATE OF MINNESOTA,
County of Chippewa, } *ss:*

T. F. Knappen, on being duly sworn, doth depose and say that he is one of the attorneys of the plaintiffs in this action. Affiant further says that neither of the defendants, Styles Carson, John T. Pirie, George Scott, Robert Scott, or Andrew McLeish, are residents of this State, and that neither of them are within this State, as affiant verily believes.

Further saith not.

T. F. KNAPPEN.

Subscribed and sworn to, this 25th day of October, 1881.
[SEAL.] JOSEPH D. BAKER,
Clerk of the District Court, Chippewa County.

9 [Endorsed:] Dist. court, Chippewa county. Evan J. Tvedt *et al. vs.* Carson Pirie *et al.* Affidavit of non-residence. Filed October 25th, 1881. Joseph D. Baker, clerk.

District Court, 12th Judicial District.

STATE OF MINNESOTA, *County of Chippewa:*

EVAN J. TVEDT and THOMAS J. TVEDT, Pl'ffs,
against
STYLES CARSON, JOHN T. PIRIE, GEO. SCOTT, ROBERT SCOTT, and Andrew McLeish, co-partners as Carson, Pirie, Scott & Co., and Owen J. Wood & Theodore S. Styles, partners as Wood & Styles, Def'ts, and John N. Bery, Garnishee.

STATE OF MINNESOTA,
County of Chippewa, } *ss:*

T. F. Knappen, on being duly sworn, doth depose and say that he is one of the attorneys of the plaintiffs in this action; affiant further says that neither of the defendants, Styles Carson, J. T. Pirie,
10 Geo. Scott, Robert Scott, or Andrew McLeish are residents of this State, and that neither of them are within this State, as affiant verily believes. Further saith not.

T. F. KNAPPEN.

Subscribed and sworn to, this 25th day of Oct., 1881.

[SEAL.] JOSEPH D. BAKER,
Clerk of the District Court.

[Endorsed:] Dist. court, Chippewa county. Tvedt *et al. vs.* Carson *et al.* Affidavit of non-residence. Filed October 25th, 1881. Joseph D. Baker, clerk of the district court, Chippewa county.

SCHEDULE A.

11 District Court.

STATE OF MINNESOTA, *County of Chippewa:*

EVAN J. TVEDT & THOS. J. TVEDT, Pl'ffs,
ag'st
STYLES CARSON, JOHN T. PIRIE, GEORGE SCOTT, ROBERT SCOTT, and Andrew McLeish, copartners as Carson, Pirie, Scott & Co., and Owen J. Wood and Theodore S. Styles, partners as Wood and Styles, Def'ts.

STATE OF MINNESOTA,
County of Chippewa, } *ss:*

T. F. Knappen, on being duly sworn, doth say that he is one of the attorneys of the plaintiffs in this action, that a summons has been issued therein, and that said summons was on the 17th day of August, 1881, placed in the hands of the sheriff of said county for service thereof upon said defendants; that on the 19th day of August, 1881, said sheriff returned said summons with his return duly endorsed thereon; that he had made diligent search and in-
quiry within his county for the defendants, Styles Carson,
12 John T. Pirie, Robert Scott, George Scott, and Andrew McLeish,
and that he was unable to find them or either of them within his said county. Affiant further says that he believes that neither of said defendants last above named are residents of this State, and that neither of them can be found therein. Affiant further states that he has deposited a copy of the summons in this action, in the post office at Montevideo, Chippewa county, Minnesota, enclosed in an envelope duly directed to the defendant, Styles Carson, at Chicago, Illinois, that being his place of residence, with the full legal postage duly prepaid thereon. Affiant further states that he has deposited a copy of the summons in this action in the post office at Montevideo, Chippewa county, Minnesota, enclosed in an envelope duly directed to the defendant, John T. Pirie, at Chicago, Illinois, that being his place of residence, with the full legal postage prepaid thereon. Affiant further states that he has deposited a copy of the summons in this action, in the post office at Montevideo, Chippewa county, Minnesota, directed to the defendant, George Scott, at Chi-
cago, Illinois, that being his place of residence, duly enclosed
13 in an envelope, with the full legal postage duly prepaid
thereon.

Affiant further states that he has deposited a copy of the summons in this action in the post office at Montevideo, Chippewa county, Minnesota, enclosed in an envelope directed to the defendant, Geo. Scott, at Chicago, Illinois, that being his place of residence, with the full legal postage prepaid thereon.

Affiant further states that he has deposited a copy of the summons in this action in the post office at Montevideo, Chippewa county, Minnesota, enclosed in an envelope and directed to the defendant, Rob't Scott, at Chicago, Illinois, that being his place of residence, with the full legal postage prepaid thereon.

Affiant further states that he has deposited a copy of the summons in this action in the post office at Montevideo, Chippewa county, Minnesota, enclosed in an envelope directed to the defendant, Andrew McLeish, at Chicago, Illinois, that being his place of residence, with the full legal postage prepaid thereon.

14 Affiant further states that the defendants, Styles Carson, John T. Pirie, Rob't Scott, Geo. Scott, and Andrew McLeish, have property within this State, and this court has jurisdiction of the subject of this action. Further affiant saith not.

T. F. KNAPPEN.

Subscribed and sworn to before me on this 6th day of Oct., 1881.

[SEAL.] JOSEPH D. BAKER.
Clerk of the District Court.

[Endorsed:] District court, Chippewa county. Tvedt *et al. vs.* Carson *et al.* Affidavit for publication of summons. Filed October 6th, 1881. Joseph D. Baker, clerk. T. F. Knappen and O'Brien & Wilson, Att'ys for Pl'ffs.

United States circuit court for the district of Minnesota, by order of the court, dated Au. 25, 1881.

District Court, 12th Judicial District.

STATE OF MINNESOTA, *County of Chippewa :*

EVAN J. TVEDT and THOMAS J. TVEDT
against
STYLES CARSON, JOHN T. PIRIE, GEORGE SCOTT, ROBERT SCOTT, and Andrew McLeish, copartners as Carson, Pirie, Scott & Co., and Owen J. Wood and Theodore S. Stiles, partners as Wood and Stiles, defendants.

15 For answer to the complaint in this action the defendants, John T. Pirie, George Scott, Robert Scott, and Andrew McLeish, answering separately, deny that now or at the time stated in the complaint they were copartners with Styles Carson, and aver that Samuel Carson, whose name is still used in their firm, has been dead many years and these defendants are the surviving partners under said firm name.

They admit the copartnership of the plaintiffs, and of their co-defendants, Wood & Styles, as in the complaint stated; they admit that at about the time stated in the complaint they caused an action to be commenced against the plaintiffs, and a stock of goods to be attached therein, claimed by the plaintiffs to belong to them, but deny that said stock of goods was worth the sum of twelve thousand dollars, or any other or greater sum than three thousand dollars.

They admit that said attachment was vacated, but aver that it was not vacated until judgment had been obtained in said action by these defendants against the plaintiffs herein, and execution issued and duly levied on said property.

16 That plaintiffs herein have since been admitted to defend said action, but said judgment is ordered to stand, and does stand, as security, which action is still pending.

That defendants have no knowledge or information sufficient to form a belief what, if anything, was the amount of net profits of plaintiffs' business per annum, but deny each and every other allegation in the complaint contained.

They deny that plaintiffs have been damaged, by reason of any of the matters charged in said complaint, in the sum of twenty thousand dollars, or any sum whatever.

GORDON E. COLE,
Att'y for Def'ts., Pirie, Scott & McLeish.

St. Paul, Minn.

STATE OF MINNESOTA, }
County of Ramsey, } *ss:*

G. E. Cole, being duly sworn, says that he is the attorney of the defendants, sued as Carson, Pirie, Scott & Co., to wit, John T. Pirie, George Scott, Robert Scott, and Andrew McLeish; that said defendants are absent from the county where the attorney resides;
17 that he has read the foregoing answer and knows the contents
thereof, and that the same is true to the best of his knowledge, information, and belief.

GORDON E. COLE.

Subscribed and sworn to before me, this 7th day of Nov., 1881.

WM. ELY BRAMHALL,
Notary Public.

Minn., Ramsey Co.

[Endorsed:] Tvedt Bros. *vs.* Carson, Pirie, Scott & Co., *et al.* Due service of within admitted, this 12th day of November, A. D. 1881. T. F. Knappen, & O'Brien & Wilson, pl'ffs att'ys. Filed this 22d day of November, A. D. 1881. Joseph D. Baker, clerk. Gordon E. Cole, att'y for def'ts., Carson, Pirie, Scott & Co., St. Paul, Minn.

18 District Court, 12th Judicial District.

Separate Answer of Wood & Stiles.

STATE OF MINNESOTA,
County of Chippewa, } *ss:*

EVAN J. TVEDT AND THOMAS J. TVEDT, Plaintiffs,
against
STYLES CARSON, JOHN T. PIRIE, GEORGE SCOTT, ROBERT SCOTT, AND Andrew McLeish, copartners, as Carson, Pirie, Scott & Co., and Owen J. Wood and Theodore S. Stiles, partners as Wood and Stiles, Defendants.

The above-named defendants, Owen J. Wood and Theodore S. Stiles, for their separate answer to the complaint of the plaintiff-herein, deny each and every allegation, matter, statement, or thing in plaintiffs' complaint herein contained, and each and every part, portion, or parcel of each and every allegation in said complaint contained, either in the manner and form therein set up and alleged or otherwise, save and except as hereinafter expressly and in so many words admitted, modified, or specifically denied.

Defendants, Owen J. Wood and Theodore S. Stiles, admit
19 that said plaintiffs, Evan J. Tvedt and Thomas J. Tvedt were,
on the 16th day of February, 1881, copartners in business at Montevideo, Minn., as they have in their said complaint alleged.

Defendants, Owen J. Wood and Theodore S. Stiles, admit that on the 16th day of February, 1881, they were partners in business at Montevideo, under the firm name of "Wood & Stiles," as said plaintiffs have alleged in their said complaint.

Defendants, Owen J. Wood & Theodore S. Stiles, further answering said complaint of the plaintiffs herein, aver that on the 16th day of February and for several years prior thereto, and still are, attorneys at law, residing and practicing at Montevideo, Minnesota, and are duly admitted to practice in all the courts of this State; that on the said 16th day of February, 1881, said defendants, under the firm name of Wood & Stiles, commenced an action in the district court of the 12th judicial district in and for Chippewa county, Minn., in which said defendants, Carson, Pirie, Scott & Co., were plaintiffs, and Tvedt Bros. were defendants, and caused a summons to issue thereon, and at the same time caused a writ of attachment to issue against
the goods and chattels of said Tvedt Bros., with express
20 instructions to Aaron J. Mullin, sheriff of Chippewa county,
Minnesota, not to make a levy on the goods and chattels of said Tvedt Bros. unless other attachments were placed in his hands, or there was great danger of said Carson, Pirie, Scott & Co. losing their said claim, and not otherwise; that on the 10th day of March, 1881, judgment was duly and regularly rendered against the said Tvedt Bros. as by default, and on said 10th day of March, 1881, execution was duly and regularly issued upon the said judgment, and on the said 10th day of March, 1881, a levy was made on the

goods and chattels of said Tyedt Bros. to satisfy said judgment; all of which will more fully appear, reference being had to said judgment.

That in beginning said action, and causing said writ of attachment to issue as aforesaid, said defendants, Wood & Stiles, were acting under special instructions from said Carson, Pirie, Scott & Co., and brought said suit and caused said writ of attachment to issue at their express instance and request, and not otherwise; that from the beginning to the end of said action said defendants, Wood & Stiles, were acting as attorneys for said Carson, Pirie, Scott & Co., and under their special instructions, and not otherwise.

21 Defendants, Owen J. Wood and Theodore S. Stiles, specifically deny that they in any manner, shape, or form conspired and colluded together, as stated in said complaint, or otherwise, with said Carson, Pirie, Scott & Co. to either oppress or break said Tvedt Bros. up in business, but aver that in all the proceedings said Wood and Stiles acted in good faith, and not otherwise.

Wherefore said Owen J. Wood and Theodore S. Stiles, partners as Wood & Stiles, demand judgment against said plaintiffs; that they be dismissed hence with their costs and disbursements.

Dated September 16th, 1881.

WOOD & STILES,
Attorneys in personam, Montevideo, Minn.

STATE OF MINNESOTA,
County of Chippewa, } *ss:*

O. J. Wood, being first duly sworn, doth depose and say that he is one of the firm of Wood & Stiles, two of the above-mentioned defendants; that he has read the above and foregoing answer, and knows the contents thereof; that the same is true of his own knowledge, except the matters therein stated on his information and belief, and as to those matters he believes it to be true.

O. J. WOOD.

Subscribed and sworn to before me, this 16th day of September, A. D. 1881. 22

[SEAL.]

CHAS. H. BUDD,
Notary Public in and for said county.

[Endorsed:] District court, 12th judicial district, Chippewa county. Evan J. Tvedt *et al. vs.* Styles Carson *et al.* Separate answer of Wood and Stiles. Due service of the within separate answer of Wood and Stiles admitted at Montevideo, Minn., this 16th day of September, A. D. 1881. T. F. Knappen, att'y for plaintiffs. Filed October 20th, 1881. Joseph D. Baker, clerk. Wood & Stiles, att'ys *in personam*, Montevideo, Minn.

Affidavit for Garnishment.

STATE OF MINNESOTA,
County of Chippewa, } *ss:*

EVAN J. TVEDT and THOMAS J. TVEDT, Pl'ffs,
vs.
STYLES CARSON, JOHN T. PIRIE, GEO. SCOTT, ROB'T SCOTT, and Andrew McLeish, copartners as Carson, Pirie, Scott & Co., and Owen J. Wood & Theodore S. Stiles, partners as Wood & Stiles, Def'ts, and John N. Bery, Garnishee.

23 STATE OF MINNESOTA,
County of Chippewa, } *ss:*

Thomas J. Tvedt came before me personally, and being duly sworn, doth depose and say that he is one of the plaintiffs in the above-entitled action; that a summons has been issued in said action; that a cause of action exists therein in favor of said plaintiffs and against defendants for the recovery of money; that the amount due to said plaintiffs from said defendants therein exceeds the amount of twenty-five dollars. And deponent further states that he believes that John N. Bery has property, money, and effects in his hands and under his control belonging to the defendants, Styles Carson, John T. Pirie, George Scott, Rob't Scott, and Andrew McLeish, copartners, as Carson, Pirie, Scott & Co., in this action exceeding twenty-five dollars in value, and that said John N. Bery is endebted to said defendants, Styles Carson, John T. Pirie, George Scott, Rob't Scott, and Andrew McLeish, copartners as Carson, Pirie, Scott & Co., in an amount exceeding the sum of twenty-five dollars; and further deponent saith not, except that he makes this affidavit for the purpose of having said John N. Bery summoned before this honorable court to answer under oath such questions as may be put to him touching his indebtedness to said defendants, Styles Carson, John T. Pirie, Geo. Scott, Rob't Scott, and Andrew McLeish, copartners as Carson, Pirie, Scott & Co., and touching any property, money, or effects of said defendants, Styles Carson, John T. Pirie, Geo. Scott, Rob't Scott, and Andrew McLeish, copartners as Carson, Pirie, Scott & Co., in his possession or under his control. 24

THOS. J. TVEDT.

Subscribed and sworn to before me, this 22nd day of August, A. D. 1881.

[SEAL.] T. F. KNAPPEN,
Notary Public, Minn.

[Endorsed:] District court, county of Chippewa. Tvedt *et al. vs.* Carson *et al.* Affidavit of garnishment. Filed August 22nd, A. D. 1881. Joseph D. Baker, clerk of said court. T. F. Knappen and O'Brien & Wilson, plaintiffs' attorneys, Montevideo, Minn.

25 *Garnishee Summons.*

District Court, 12th Judicial District.

STATE OF MINNESOTA, } ss:
County of Chippewa, }

EVAN J. TVEDT and THOMAS J. TVEDT, Pl'ffs,
against
STYLES CARSON, JOHN T. PIRIE, GEO. SCOTT, ROB'T SCOTT, and Andrew McLeish, copartners as Carson, Pirie, Scott & Co., and Owen J. Wood and Theodore S. Stiles, partners as Wood & Stiles, and John N. Bery, Garnishee.

The State of Minnesota to John N. Bery, the above-named garnishee:

Whereas the affidavit of Thomas J. Tvedt, one of the above-named plaintiffs, has been filed with the clerk of said court, at his office in said county, in an action therein pending, wherein the said Evan J. Tvedt and Thomas J. Tvedt are plaintiffs and the said Styles Carson, John T. Pirie, Geo. Scott, Rob't Scott, and Andrew McLeish, copartners as Carson, Pirie, Scott & Co., and Owen J. Wood and Theodore S. Stiles, partners as Wood and Stiles, are defendants, stating, among other things, that he believes that John N. Bery, garnishee above-named, has property and effects in his hands and under his control belonging to the said defendants, Styles Carson, John T. Pirie,
26 Geo. Scott, Rob't Scott, and Andrew McLeish, copartners as Carson, Pirie, Scott & Co., of a value exceeding the sum of twenty-five dollars, and that said garnishee is indebted to the defendants Styles Carson, John T. Pirie, Geo. Scott, Rob't Scott, and Andrew McLeish, copartners as Carson, Pirie, Scott & Co., in an amount exceeding twenty-five dollars, as by the same will more fully appear.

Therefore, you, the said garnishee, are hereby required to appear before the Honorable John H. Brown, judge of said court, at the court-room in Montevideo, in the county of Chippewa and State aforesaid, on Tuesday, the 25th day of October, A. D. 1881, at two o'clock in the afternoon of that day, and then and there answer, under oath, such questions as may be put to you, the said garnishee, touching your indebtedness to said defendants, Styles Carson, John T. Pirie, Geo. Scott, Rob't Scott, and Andrew McLeish, copartners as Carson, Pirie, Scott & Co., and as to any property, money, or effects of the defendants, Styles Carson, John T. Pirie, Geo. Scott, Rob't Scott, and Andrew McLeish, co-partners as Carson, Pirie, Scott & Co., in your possession or under your control.

Dated Aug. 22nd, A. D. 1881.

T. F. KNAPPEN AND
O'BRIEN AND WILSON,
Plaintiffs' Attorneys, Montevideo, Minn.

27 STATE OF MINNESOTA, }
County of Chippewa, } *ss:*

I do hereby certify that at the village of Appleton, in said county and State, on the 22d of Aug., 1881, I served the within garnishee summons on the within-named garnishee, John N. Bery, personally, by handing to and leaving with him a true and correct copy of the within, and at the same time paid him the sum of $4.40 cents, fees for mileage and one day's attendance; and further, I have made diligent search and inquiry for the within-named Styles Carson, John T. Pirie, George Scott, Robert Scott, and Andrew McLeish, and I am unable to find them, or either of them, within my county.

Dated this 22nd day of August, 1881.

A. J. CARINHAN,
Sheriff of Swift County.
By A. McMILLEN, *Dept.*

Fees for service on garnishee -------------	1 00
" " copy and mileage fees ----------	2 12
Search and inquiry for 5 def'ts-----------	5 00
	8 12

[Endorsed:] District court, county of Chippewa. Evan J. Tvedt *vs.* Carson Pirie *et al.* Garnishee summons and notice to defendant. Filed October 25th, 1881. Joseph D. Baker, clerk dist. court. Filed Dec. 1, 1881. H. E. Mann, clerk.

28 *Affidavit for Garnishment.*

District Court, 12th Judicial District.

STATE OF MINNESOTA, }
County of Chippewa, } *ss:*

EVAN J. TVEDT and THOMAS J. TVEDT, Pl'ffs,
ag'st
STYLES CARSON, JOHN T. PIRIE, GEO. SCOTT, ROB'T SCOTT, and Andrew McLeish, copartners as Carson, Pirie, Scott & Co., and Owen J. Wood and Theodore S. Stiles, partners as Wood and Stiles, and John J. Bergoust, Garnishee.

STATE OF MINNESOTA, }
County of Chippewa, } *ss:*

Thomas J. Tvedt came before me personally, and being duly sworn, doth depose and say that he is one of the plaintiffs in the above-entitled action; that a summons has been issued in said action; that a cause of action exists therein in favor of said plaintiffs and against defendants for the recovery of money; that the amount due to said plaintiffs from said defendants therein exceeds the sum of twenty-five dollars.

And deponent further states that he believes that John J. Bergoust has property, money, and effects in his hands and under his control belonging to the defendants, Styles Carson, John T. Pirie, Geo. Scott, Rob't Scott, and Andrew McLeish, copartners as Carson, 29 Pirie, Scott & Co., in this action exceeding twenty-five dollars in value, and that said John J. Bergoust is indebted to said defendants, Styles Carson, John T. Pirie, Geo. Scott, Rob't Scott, and Andrew McLeish, copartners as Carson, Pirie, Scott & Co., in an amount exceeding the sum of twenty-five dollars; and further deponent saith not, except that he makes this affidavit for the purpose of having said John J. Bergoust summoned before this honorable court to answer under oath such questions as may be put to him touching his indebtedness to said defendants Styles, Carson, John T. Pirie, Geo. Scott, Rob't Scott, and Andrew McLeish, copartners as Carson, Pirie, Scott & Co., and touching any property, money, or effects of said defendants, Styles Carson, John T. Pirie, Geo. Scott, Rob't Scott, and Andrew McLeish, copartners as Carson, Pirie, Scott & Co., in his possession or under his control.

THOMAS J. TVEDT.

Subscribed and sworn to before me, this 17th day of August, A. D. 1881.

[SEAL.] T. F. KNAPPEN,
Notary Public, Minn.

[Endorsed:] District court, county of Chippewa. Tvedt *et al. vs.* Carson *et al.* Affidavit for garnishment. Filed August 17th, A. D. 1881. Joseph D. Baker, clerk of said court. O'Brien & Wilson, plaintiffs' attorneys. Montevideo, Minn.

---

30 District Court, 12th Judicial District.

STATE OF MINNESOTA, *County of Chippewa:*

EVAN J. TVEDT and THOMAS J. TVEDT, Pl'ffs,
ag'st
STYLES CARSON, JOHN T. PIRIE, GEORGE SCOTT, ROB'T SCOTT, and Andrew McLeish, copartners as Carson, Pirie, Scott & Co., and Owen J. Wood and Theodore S. Stiles, partners as Wood & Stiles, def'ts, and John N. Bery, Garnishee.

The garnishee above named, having been summoned to appear before the court at a general term thereof held in said county on the 25th day of October, 1881, on the opening of the court on that day, to answer and make disclosure touching his indebtedness to the said defendants, and the said cause having been called in open court—

Ordered, that the disclosure of said garnishee be taken before Joseph D. Baker, clerk of this court, at his office, in Montevideo, in said county, on the 25th day of October, 1881.

Ordered further, that the said garnishee appear before said clerk at the time and place aforesaid and make disclosure touching his indebtedness to the defendants in said action.

Dated Oct. 25th, 1881.

JOHN H. BROWN,
Dist. Judge.

31 [Endorsed:] Dist. court, Chippewa county. Tvedt *et al.* *vs.* Carson *et al.* Order for disclosure before J. D. Baker. Filed October 25th, 1881. Joseph D. Baker, clerk.

District Court, 12th Judicial District.

STATE OF MINNESOTA, *County of Chippewa:*

EVAN J. TVEDT and THOMAS J. TVEDT, Plaintiffs,
against
STYLES CARSON, JOHN T. PIRIE, GEORGE SCOTT, ROB'T SCOTT, and Andrew McLeish, copartners as Carson, Pirie, Scott & Co., and Owen J. Wood and Theodore S. Stiles, partners as Wood & Stiles, and John N. Bery, Garnishee.

Pursuant to an order of the court, and filed this 25th day of October, 1881, in the above-entitled action, the above-named garnishee, John N. Bery, appearing for the purpose of making disclosures pursuant to said order, T. F. Knappen appearing for plaintiffs, John N. Bery being called, and on being first duly sworn, declares as follows:

I. I am the garnishee above named; I know the above-named defendants, Carson, Pirie, Scott & Co.; I live at Appleton, 32 Minnesota; I was indebted to the above-named defendants, Carson, Pirie, Scott & Co., at the time that the garnishee summons was served upon me on the 22d day of August, 1881, in the sum of three hundred thirty 16-100 dollars; that the same is now due and owing to the defendants by me.

Dated Montevideo, October 25th, 1881.

[SEAL.] JOSEPH D. BAKER,
Clerk of the District Court.

[Endorsed:] District court, Chippewa county. Evan J. Tvedt *et al. vs.* Styles Carson *et al.* Disclosure of John N. Bery. Filed November 25th, 1881. Joseph D. Baker, clerk.

District Court, 12th Judicial District.

STATE OF MINNESOTA, *County of Chippewa:*

EVAN J. TVEDT and THOMAS J. TVEDT, Pl'ffs,
ag'st
STYLES CARSON, JOHN T. PIRIE, GEORGE SCOTT, ROB'T SCOTT, and Andrew McLeish, copartners as Carson, Pirie, Scott & Co., and Owen J. Wood and Theodore S. Stiles, partners as Wood and Stiles, Def'ts, and John J. Bergoust, Garnishee.

33 The garnishee above named having been summoned to appear before the court at a general term thereof, held in said county on the 25th day of October, 1881, on the opening of the court on that day to answer and make disclosure touching his indebtedness to the said defendants, the said cause having been called up in open court——

Ordered that the disclosure of said garnishee be taken before Joseph D. Baker, clerk of this court, at his office in Montevideo in said county, on the 25th day of Oct., 1881; ordered further, that the said garnishee appear before the said clerk at the time and place aforesaid, and make disclosure touching his indebtedness to the defendants in said action.

Dated Oct. 25th, 1881.

JOHN H. BROWN,
Dist. Judge.

[Endorsed:] Dist. court, Chippewa county. Tvedt *et al. vs.* Carson *et al.* Order for disclosure before J. D. Baker. Filed Oct. 25th, 1881. Joseph D. Baker, clerk.

34 District Court, Twelfth Judicial District.

STATE OF MINNESOTA, *Chippewa County:*

EVAN J. TVEDT and THOMAS J. TVEDT, Plaintiffs,
against
STYLES CARSON, JOHN T. PIRIE, GEORGE SCOTT, ROB'T SCOTT, and Andrew McLeish, copartners as Carson, Pirie, Scott & Co., and Owen J. Wood and Theodore S. Stiles, partners under the firm name of Wood & Stiles.

To the above-named court:

The petition of John T. Pirie, George Scott, Rob't Scott, Andrew McLeish, sued as partners under the firm name of Carson, Pirie, Scott & Co., respectfully showeth that this suit is an action-at-law, now pending in the above-named court; that the matter in dispute exceeds exclusive of costs the sum or value of five hundred dollars.

That the plaintiffs are and were, when this suit was commenced, residents and citizens of the State of Minnesota, and the defendant, John T. Pirie, is and was, when this suit was commenced, a citizen of the State of New York, and the defendants, Geo. Scott, Rob't Scott, and Andrew McLeish, are and were, when this suit was commenced, citizens of the State of Illinois; that the said de-
35 fendants are the sole surviving members of the firm of Carson, Pirie, Scott & Co., Samuel Carson, erroneously designated in the complaint and summons as Styles Carson, has been dead many years; that the defendants, Wood & Stiles, are and were, when this suit was commenced, citizens of the State of Minnesota.

That this action is an action of tort and there is in said action a controversy which is wholly between citizens of different States, to wit, between the plaintiffs and said Pirie, Scott & McLeish, partners under the style of Carson, Pirie, Scott & Co., and that said controversy can be fully determined as between them, and the said petitioners have made and file herewith a bond, with good and sufficient surety, for their entering in the circuit court of the United States for the district of Minnesota, on the first day of its next session, a copy of the record in this suit, and for paying all costs that may be awarded by the said circuit court, if the said court shall hold that said suit was wrongfully or improperly removed thereto.

Wherefore your petitioners pray that this suit may be removed unto the said circuit court of the United States for the district of Minnesota and that this court accept this petition and proceed no further in this suit.

36 GORDON E. COLE,
Attorney for Defendants, Carson, Pirie, Scott and Company, and for Def'ts, John T. Pirie, George Scott, Robert Scott, and Andrew McLeish.

37 STATE OF ILLINOIS, *County of Cook:*

John A. Sweet, being duly sworn, says that he is the general agent of the defendants, Carson, Pirie, Scott and Company, for the conduct and management of this suit, and is expressly authorized and directed by them to retain attorneys and to cause this suit to be removed into the United States circuit court for the district of Minnesota, and has directed their attorney to take all necessary steps for said removal; that he has read the foregoing petition and knows the contents thereof, and the same is true of his own knowledge.

JOHN A. SWEET.

Subscribed and sworn to before me, this 15th day of October, A. D. 1881.

[SEAL.] J. SANDFORD BETTS,
Notary Public, Cook County, Ills.

STATE OF ILLINOIS, }
Cook County, } *ss:*

I, E. F. Clokke, clerk of the county court in and for said county, do hereby certify that J. Sanford Betts, Esq., is a notary public in said county, duly commissioned and sworn, and whose acts as such are entitled to credit; that his commission bears date of Oct. 1, A. D. 1881, and will expire Oct. 1, A. D. 1885.

In testimony whereof, I have hereunto set my hand and affixed the seal of said court, at the city of Chicago, in said county, this 15th day of October, A. D. 1881.

[SEAL.] E. F. CLOKKE, *Clerk.*

[Endorsed:] Dist. c't, Chippewa co., State of Minnesota. Evan J. Tvedt *et al. vs.* Styles Carson *et al.* Petition for removal to U. S. cir. c't. Filed Oct. 26, 1881. Joseph D. Baker, clerk, p'r W. S. Shardlow, deputy.

38 District Court, Twelfth Judicial District.

STATE OF MINNESOTA, *Chippewa County:*

EVAN J. TVEDT and THOMAS J. TVEDT
ag'st
STYLES CARSON, JOHN T. PIRIE, GEORGE SCOTT, ROBERT SCOTT, and Andrew McLeish, copartners as Carson, Pirie, Scott & Co., and Owen J. Wood and Theodore S. Stiles, partners as Wood & Stiles.

Know all men by these presents, that we, John T. Pirie, George Scott, Robert Scott, and Andrew McLeish, partners under the firm name of Carson, Pirie, Scott & Co., as principals, George R. Finch, of the county of Ramsey and State of Minnesota, as surety, are firmly bound unto the above-named plaintiffs, Evan J. Tvedt and Thomas J. Tvedt, in the sum of one thousand dollars, to the payment whereof well and truly to be made to the said Evan J. Tvedt and Thomas J. Tvedt, their heirs, executors, administrators, and assigns, we bind ourselves, our heirs, executors, and administrators, firmly by these presents.

Sealed with our seals, this 15th day of October, 1881.

The condition of this obligation is such, that whereas the above-bounden John T. Pirie, George Scott, Robert Scott, and Andrew McLeish, copartners under the firm name of Carson, Pirie, Scott
39 & Co., have filed their petition in this action in this court
praying to have said suit removed into the United States circuit court for the district of Minnesota: Now, therefore, if they shall enter in the said circuit court on the first day of the next session thereof a copy of the record in this suit, and shall pay all costs that may be awarded by said circuit court if said court shall hold that said suit was wrongfully or improperly removed thereto, then this obligation shall be void; otherwise in full force and effect.

JOHN T. PIRIE. [SEAL.]
GEORGE SCOTT. [SEAL.]
ROBERT SCOTT. [SEAL.]
ANDREW McLEISH, [SEAL.]
By JOHN A. SWEET, [SEAL.]
Their Attorney in Fact.
GEORGE R. FINCH. [SEAL.]

STATE OF ILLINOIS, } *ss:*
County of Cook, }

Be it known, that on this 15th day of October, 1881, before me, personally came John A. Sweet, attorney in fact for Jno. T. Pirie, George Scott, Robert Scott, and Andrew McLeish, also George R. Finch, to me well known as the identical persons by those names who executed the foregoing bond, and acknowledged that they executed the same as their free act and deed.

40 Subscribed and sworn to before me, this 15th day of Octo., A. D. 1881.

J. SANFORD BETTS,
Notary Public, Cook County, Illinois,
As to John A. Sweet, Attorney in Fact.

STATE OF MINNESOTA,
County of Ramsey, } *ss:*

George R. Finch, being duly sworn, deposes and says that he is the surety on the foregoing bond, that he is a resident and free holder of the State of Minnesota, and is worth the penalty of the foregoing bond, over and above his just debts and liabilities and exclusive of his property exempt from execution.

GEORGE R. FINCH.

Subscribed and sworn to before me, this 17th day of October, 1881.

[SEAL.] WM. ELY BRAMHALL,
Notary Public, Ramsey Co., Minn.

STATE OF ILLINOIS,
Cook County, } *ss:*

I, E. F. C. Klokke, clerk of the county court in and for said county, do hereby certify that J. Sanford Betts, Esq., is a notary pub-
41 lic in said county, duly commissioned and sworn, and whose acts as such are entitled to credit; that his commission bears date of October 1, A. D. 1881, and will expire October 1, A. D. 1885.

In testimony whereof, I have hereunto set my hand and affixed the seal of said court, at the city of Chicago, in said county, this 15th day of October, A. D. 1881.

[SEAL.] E. F. C. KLOKKE, *Clerk.*

[Endorsed:] District court, Chippewa county, Minnesota. Evan J. Tvedt *et al. v.* Styles Carson *et al.* Removal bond. Filed Oct. 26th, 1881. Joseph D. Baker, clerk. By W. S. Shandlow, deputy.

District Court, 12th Judicial District.

STATE OF MINNESOTA, *Chippewa County:*

EVAN J. TVEDT and THOMAS J. TVEDT
against
STYLES CARSON, JOHN F. PIRIE, GEORGE SCOTT, ROBERT SCOTT, and Andrew McLeish, copartners as Carson, Pirie, Scott & Co., and Owen J. Wood and Theodore S. Stiles, partners as Wood & Stiles.

42 On reading and filing the petition of the defendants, Pirie, Scotts, and McLeish, partners under the style of Carson, Pirie, Scott & Co., it appearing that the present suit is an action at law; that the matter in dispute exceeds five hundred dollars, exclusive of costs; that there is a controversy in said suit between citizens of different States, and which is wholly between citizens of different States, and which can be fully determined as between them, and that the plaintiffs are and were, at the commencement of this action, citizens of the State of Minnesota, and the petitioners were, at the time this action was commenced, citizens of States other than the State of Minnesota, and interested in said controversy, which is wholly between said plaintiffs and said petitioners, and can be fully determined as between them; and said petitioners having filed a

bond, with good and sufficient surety, for their entering in the circuit court for the district of Minnesota, on the first day of the next session, a copy of the record in this action, and for paying all costs that may be awarded by the said circuit court, if said court shall hold that said suit was wrongfully or improperly removed thereto:

Now, therefore, it is ordered that this action be, and the same is hereby, removed to the said circuit court, and that said peti-
43 tion be, and the same is, accepted, and that this court proceed no further in said suit.

Done at Montevideo, Minn., this 25th day of October, 1881.

JOHN H. BROWN,
Judge Twelfth Judicial District of State of Minnesota.

[Endorsed:] Dist. c't, Chippewa county, State of Minnesota. Evan J. Tvedt *et al.* *v.* Styles Carson *et al.* Order for removal. Filed Oct. 31, 1881. Joseph D. Baker, clerk. By W. S. Shandlow, deputy.

STATE OF MINNESOTA,
County of Chippewa, } *ss:*

I, Joseph D. Baker, clerk of the district court for the 12th judicial district and county aforesaid, do hereby certify that I have compared the foregoing copies of the complaint, 2 affidavits of non-residence, affidavit of publication, separate answer of Carson, Pirie, Scott & Co., separate answer of Wood and Stiles, 2 affidavits for garnishment, garnishee summons, 2 orders for disclosures, disclosure of John
44 N. Bery, petition for removal, bond for removal, and order for removal within and the indorsements thereupon, in the above-entitled action now on file in my office, that the same are copies of all the papers in this suit in my office, and are true and correct transcripts therefrom, and the whole of said original.

In testimony whereof, I have hereunto set my hand and affixed the seal of my office, this 29th day of November, A. D. 1881.

[SEAL.] JOSEPH D. BAKER,
Clerk of the District Court.

Endorsed: Filed Dec. 1, 1881. H. E. Mann, clerk.

45 United States Circuit Court for the District of Minnesota.

Term minutes. December Term, A. D. 1881. December 15, 1881.

Present: Hon. George W. McCrary, Rensselaer R. Nelson, judges.

EVAN J. TVEDT *et al.* *vs.* STYLES CARSON *et al.*

On motion of defendants, it is ordered that they have leave to file a supplemental answer.

46 United States Circuit Court, District of Minnesota.

EVAN J. TVEDT and THOMAS J. TVEDT
vs.
CARSON, PIRIE, SCOTT & CO. *et al.*

For supplemental answer to the complaint in this action the defendants, Pirie, Scotts, and McLeish, partners as Carson, Pirie, Scott and Company, respectfully show to the court that on the twelfth of November, 1881, they caused their answer in this action to be served, in which they deny all the material allegations of the complaint, and admit that an attachment, which had been issued and levied upon plaintiffs' property in an action brought by these defendants against these plaintiffs in the district court of the county of Chippewa in said State, had been set aside; but aver that it was not set aside until a judgment in said action had been rendered, and an execution issued thereon and levied upon said property, and that the plaintiffs herein had since been admitted to defend said action; but said judgment was ordered to stand and did stand as security, which action was still pending when said answer was served, and it was so alleged therein.

And by way of supplemental answer, the defendants aver that since the service of said original answer, the referee, to whom 47 said action was referred, to wit, said attachment suit, has filed his finding, whereby he finds in favor of the defendants herein, being plaintiffs in said former action, and orders judgment accordingly, and on the 19th day of December, 1881, judgment was duly entered upon said report for the plaintiff, and against the defendants in said action.

And the defendants deny all the allegations in the complaint not admitted by said original answer as therein denied.

GORDON E. COLE,
Att'y for Defendants, Pirie, Scotts and McLeish.

STATE OF MINNESOTA, } ss:
County of Ramsey, }

Gordon E. Cole, being duly sworn, says that he is attorney for defendants, Pirie, Scotts, and McLeish, sued under the firm name of Carson, Pirie, Scott & Co.; that the defendants aforesaid are absent from the county wherein their attorney resides; that he has read the foregoing supplemental answer, and knows the contents thereof, and that the same is true to the best of his information, knowledge, and belief.

GORDON E. COLE.

Subscribed and sworn to, this 21st day of December, 1881, before me.

[SEAL.] WM. ELY BRAMHALL,
Notary Public, Ramsey Co., Minn.

48 [Endorsed first:] U. S. circuit court, dist. of Minnesota. Tvedt Bros. *v.* Carson, Pirie, Scott & Co. *et als.* Supplemental answer. Filed Dec. 22, 1881. H. E. Mann, clerk. Gordon E. Cole, att'y for def'ts, Carson, Pirie, Scott & Co., St. Paul, Minn.

[Endorsed second:] Personal service of within supplemental answer admitted by us by copy, on December 22nd, 1881. T. F. Knappen. O'Brien & Wilson, pl'ffs' att'ys.

49 United States Circuit Court for the District of Minnesota.

Term minutes. June term, A. D. 1882. June 27, 1882.

Present: Hon. Samuel Treat, judge.

EVAN J. TVEDT *et al.* *vs.* STYLES CARSON *et al.*

This cause being reached on the calendar, and called, the parties appeared by their respective attorneys, the plaintiff- by Messrs. O'Brien & Wilson, and T. F. Knappen, Esq., and the defendants by Gordon E. Cole, Esq., and Messrs. Wood & Stiles.

Whereupon a jury being called came, to wit:

A. D. Sargent, R. K. Holding, Daniel Kelly, H. K. Taylor, T. O. Hall, H. J. Brainerd, John Frank, William Walling, J. B. Lambert, O. L. Westergaard, Hugh Derham, Timothy Lynch. Who are duly impaneled and sworn.

T. F. Knappen, Esq., opens the case for plaintiffs.
Evan J. Tvedt is sworn and examined as a witness for the plaintiff.
T. J. Tvedt " " " "
A. J. Mullin " " " "
Chas. H. Budd " " " "
T. J. Tvedt is recalled & further " " "
M. Anderson is sworn and " " "
Plaintiff introduces documentary evidence and rests.
Gordon E. Cole, Esq., opens the case for defendants.
Defendant introduces documentary evidence.
A. L. Wing is sworn and examined as a witness for defendants.
John A. Sweet " " " "
O. J. Wood " " " "
T. S. Stiles " " " "

50 United States Circuit Court for the District of Minnesota.

Term minutes. June term A. D. 1882. June 28, 1882.

Present: Hon. Samuel Treat, judge.

EVAN J. TVEDT *et al.* *vs.* STYLES CARSON *et al.*

This cause coming on for further trial the parties appeared by their respective attorneys, and the jury, heretofore impaneled and sworn herein, being called, came also.

M. Meyer is sworn and examined as a witness for defendant.
John D. Nesbit " " " " " " "
E. C. Olson " " " " " " "
J. S. Betts " " " " " " "
Defendant rests.

Evan J. Tvedt is recalled and further examined as a witness for plaintiff.

T. J. Tvedt is recalled and further examined as a witness for plaintiff.

O. R. Olson is sworn and examined as a witness for plaintiff.

A. J. Mullin is recalled and further examined as a witness for plaintiff.

Evan J. Tvedt is recalled and further examined as a witness for plaintiff.

Plaintiff rests in rebuttal.

The defendants, Styles Carson, John T. Pirie, George Scott, Robert Scott, & Andrew McLeish, copartners as Pirie, Scott & Co., by their attorney, move that the court instruct the jury that they find a verdict for them, the said defendants. Whereupon, after argument and consideration thereof, the court granted such motion and so instructed the jury, who, without leaving their seats, return their verdict to the court in writing, entitled in this cause and in the words and figures following: "We, the jury in the above-entitled suit, "find for the defendants, Styles Carson, John T. Pirie, George Scott, "Robert Scott, Andrew McLeish, copartners as Pirie, Scott & Co.

R. K. HOLDING, *Foreman*."

51 United States Circuit Court, District of Minnesota.

E. J. TVEDT *et al.* *vs.* STYLES CARSON *et al.*

We, the jury in the above-entitled suit, find for the defendants, Styles Carson, J. T. Pirie, George Scott, Robert Scott, and Andrew McLeish, copartners as Pirie, Scott & Co.

R. K. HOLDING, *Foreman.*

[Endorsed:] U. S. circuit court, Minnesota. E. J. Tvedt *et al.* *vs.* Styles Carson *et al.* Verdict. Filed June 28, 1882. H. E. Mann, clerk. By O. J. Reynolds, deputy.

52 United States Circuit Court for the District of Minnesota.

Present: Hon. Samuel Treat, judge.

Term minutes. June term, A. D. 1882. July 15, 1882.

EVAN J. TVEDT & THOMAS J. TVEDT
vs.
STYLES CARSON, JOHN T. PIRIE, GEORGE SCOTT, ROBERT SCOTT, ANdrew McLeish, copartners as Carson, Pirie, Scott & Co., and Owen J. Wood and Theodore S. Stiles, partners as Wood & Stiles.

Upon further consideration of this cause, it is by the court ordered that the verdict found by the jury in this cause be, and the same is hereby, set aside and vacated, and that the order heretofore made in this cause denying the plaintiffs' motion to remand this cause to the State court be, and the same is hereby, overruled, and that this cause be, and the same is hereby, remanded to the State court from which it was removed to this court. The defendants, Carson, Pirie, Scott & Co., by their attorney, Gordon E. Cole, Esq., duly excepted to the foregoing order, and their exception was allowed by the court.

53 U. S. Circuit Court, District of Minnesota.

TVEDT *et al. vs.* CARSON *et al.*

TREAT, *J.:*

This case was instituted in the State court against several non-resident defendants; also Wood and Stiles, residents. The action is for malicious prosecution; the cause was removed from the State court to this court at the instance of the non-resident defendants; without suggestion to the court that this was a removed cause it went to trial on its merits.

It appeared that the non-residents, being merchants, had sold and delivered to the plaintiffs goods amounting to three or four hundred dollars. Having heard a rumor that the plaintiffs had failed, a telegram was sent by them to Wood, of the law firm of Wood and Stiles, inquiring as to the truth of said rumor. Wood answered, substantially, that the plaintiffs had not yet failed, but were in a bad way, and requested said non-resident defendants to send forward the amount of their demand and the individual names of the members of the firm. That was done, together with a direction to secure
54 their demand at all hazards. After information secured by
Wood and Stiles as to the preparation of an attachment suit in the interest of others, Stiles made the needed affidavit for an attachment, upon the strength of which a levy was made.

It was contended that such action having been had without previous demand for the amount due, other attachment suits of like nature were induced, whereby the store of the plaintiffs, under the several attachments and other suits following and executions issued, plaintiffs' property was sacrificed as said execution sales.

Judgment was had in the State court, as by default, against the plaintiffs here for the amount of the demand made by the non-resident defendants in this suit, and execution was issued and levied accordingly; also several executions under other judgments.

The non-resident defendants in this suit gave no direction to their local attorney- as to the manner in which they should proceed, but, before final judgment, were informed that an attachment suit had been instituted in their name. Of the facts averred in the affidavit made by Stiles they knew nothing. There was no evidence
55 offered to show the connection of the non-residents with the
commencement and continuance of said attachment suits other than what is thus stated.

At the close of the case the counsel for said non-resident defendants asked the direction of the court as to their liability on the case as made. The court, holding that they were not responsible in this action for what their local attorneys had done without their knowledge or direction, ordered a verdict in favor of said non-resident defendants, and suggested to plaintiffs' counsel to proceed before the jury with their cause of action against said Wood and Stiles. The plaintiffs' counsel thereupon moved to remand the cause, which was overruled, a verdict for non-resident defendants was rendered, and then plaintiffs' counsel moved to remand the cause *at* to the resident defendants, which motion was also overruled. No further action was had because said resident defendants had not appeared to contest the cause, and the plaintiffs declined to proceed further as to them. At that stage of the case it was suggested by said resident defendants that they were willing to have the case as to them submitted to the jury.

It should be also stated that, after judgment had been ren-
56 dered in the original attachment suit, the same was opened
on motion, and after said motion was heard the attachment was dismissed, but the judgment for the demand sued for upheld, leaving in force the levy on execution. There were many facts and circumstances developed which made it proper for the jury to decide whether said Wood and Stiles acted with malice and without proper cause.

It will thus be seen that the case is anomalous. In one of its aspects the court should, at the request of Wood and Stiles, have submitted the case as to them unargued to the jury under such instructions as the case demanded, inasmuch as plaintiffs' counsel declined to proceed further as to them, resting on his motion to remand.

In another aspect it may be urged that as the whole case was before the jury and a verdict rendered in favor of the non-resident defendants on the submission of the case, and nothing was said in the verdict as to the other defendants, the verdict under the circumstances stated should be held as if for all the defendants.

Behind the immediate conduct of the suit and the verdict rendered is the grave question, whether this suit was removable
57 to the U. S. court. The action was *ex delictu* a tort in respect
to which the plaintiffs could sue one or all of the tort feasers. They chose to sue all resident and non-resident in one suit; the non-resident defendants caused the whole suit to be removed and now contend that as the cause of action was severable as against tort feasers the case falls within the recent rulings of the U. S. Supreme Court. It is conceeded and has been expressly decided that the act of 1866 is repealed by the act of 1875, so that the whole case must be removed, if a removal is had.

It therefore becomes necessary to decide whether, under the act of 1875, this cause was removable. The question presented has been suggested to the U. S. Supreme Court in several cases, the most recent of which went to that Court from this circuit. In the case of Latham *vs.* Barney (102 U. S. Rep., 205) no new views were expressed, but an elaborate analysis given of the various acts of Congress, whereby the conclusion theretofore reached was upheld, viz., that where many parties are named, some of whom are formal, though escential, to the record, U. S. courts are not ousted of their jurisdiction, if, under another distribution of the parties to the record, the real controversy is between citizens of different States. That
58 case is only one of many to the same point.

The case of Hyde *et al. vs.* Rupli *et al.* has since been before the U. S. Supreme Court, in which the opinion of this court in remanding said case was sustained. That was a suit by a Minnesota plaintiff on a contract of bailment against copartners, one of whom was a citizen of the same State with plaintiffs, and the other copartners (defendants) citizens of another State. The U. S. Supreme Court held that the case was not removable. How does this suit differ from that in principle?

The act of 1866, in terms, permitted the unseemly condition of having a suit in a State court split in two as to the respective parties, whereby precisely the same cause of action would be pursued at the same time as to some of the defendants in the State court and as to others in a U. S. court. It is evident that the result of the distinct trials in different jurisdictions might differ, and consequently persons equally liable would be in the stranger predicament of having no right of contribution, where allowable, where judgment against some in one jurisdiction was had and a judgment for the others rendered
in another jurisdiction. What judgment should dominate?
59 Why should not the parties, in whose favor a judgment had
been secured, be protected thereby? And why should the others, who had been mulcted by a different judgment, be stripped of their legal right to contribution by a decision of a court in which they had ceased to be parties.

Without pursuing the inquiry into the stranger conditions in which parties might be involved under the act of 1866, it must suffice that in some of the Federal courts strong dissenting opinions were originally given when said act was so construed as to permit such anomalous results, and as to the constitutionality of said act, if such was the legitimate construction of its terms.

It may be that, from such and other considerations, Congress, in its wisdom, repealed that statute. The mischief to be remedied must be regarded in construing any statute which changes prior laws or enactments. Hence, it is clear that the following language of the act of 1875 ought to receive only one interpretation. That act says, in section two, that any suit of a civil nature, &c., may be removed from a State to a U. S. court (omitting other provisions).
"When, in any suit mentioned in this section, there shall be
60 a controversy which is *wholly* between citizens of different
States, and which can be fully determined as between them, then either one or more of the plaintiffs or defendants *actually interested* in such controversy may remove said suit to the circuit court of the United States for the proper district."

The plain meaning of the provisions of the act of 1875 thus quoted is, that when all the plaintiffs are residents, for instance, in the State in whose local court the suit is brought, and all the defendants are non-residents, then *all* the defendants may, by uniting, cause the suit to be wholly removed, or any *one* of the many non-residents may cause the removal of the *whole* case, although his co-defendants do not join in the request.

Under such construction of the statute the whole case, without splitting, would be transferred to the Federal court, and no constitutional difficulty arise. While it is the constitutional right of the citizen of one State, other than that of which his adversary is a citizen, to have the controversy decided in a U. S. court, it is equally the right of citizens of the same State to be heard solely in the State courts.

To avoid that difficulty the act of 1866 was passed; but, as it involved greater difficulties, such as already suggested in this
61 opinion, Congress repealed that act, so that now there can be no so-called splitting of cases. The whole case must be removed or no removal had. The act of 1875 is quite explicit. All of the actual parties on the one side or the other must be citizens of different States, in which event one of the non-residents, even if the others on the same side do not join, may cause the whole controversy to be removed.

The act of 1875, however, is guarded in its terms, so as to prevent injustice; for it, as it were, emphasizus the clause that "either one or more of the plaintiffs or defendants (under the conditions stated) *actually interested* in such controversy may remove," &c. Under that provision the Federal courts look to the position of the parties to ascertain whether they are *actually interested*, and if not, as in Latham *vs.* Barney, the jurisdiction of the Federal court is not ousted.

In the suit now under consideration an apt illustration occurs. Many persons were sued in the State court, some resident and some non-resident. The non-resident caused a removal. It is true the plaintiff could have sued any one or more of said defendants, because the action was in its nature severable, yet he chose, as
62 was his right, to pursue all the wrong-doers in one suit. In the progress of this suit it is judicially determined on the merits that no cause of action exists against the non-residents, leaving the case to be further pursued solely between resident plaintiffs and resident defendants. The case thus became split into two parts, to be continued in a forum which had no jurisdiction of the remaining parties if they had originally been the sole parties. There could not be presented a more forcible illustration of the error in holding that the cause was removable at all.

It is unnecessary to trace the rulings under the act of 1789 and subsequent acts to the present time to show that the conclusion reached is the only justifiable one.

The case was not removable, and should have been remanded, on motion, at the outset, without reserving that motion until the case had been tried on its merits; still, it is the duty of this court, when at any stage of the proceedings it ascertains that it has no rightful jurisdiction, to dismiss or remand. The court is bound to correct its errors when made to appear. It therefore sets aside the verdict rendered, overrules its own action on the motions for
63 removal, and orders the whole case remanded to the State court whence it was removed, with costs against the removing parties.

NELSON, J., did not sit in the case.

(Endorsed:) Filed July 15, 1882. H. E. Mann, clerk.

64 *Bill of Exceptions in case of—*

EVAN J. TVEDT *et al. vs.* STYLES CARSON *et al.*

The foregoing cause having come on to be heard upon the record thereof, transferred to this court from the State court, and which record is hereto annexed and made a part hereof, a jury was duly impaneled to try the issues between the plaintiffs and the defendants. Thereupon the plaintiffs introduced evidence tending to show that in February, 1881, and for some three years prior thereto, they had been engaged in the business of general merchandize at Montevideo, Chippewa county, Minnesota;

That said business was a large and prosperous one and amounted to some $30,000.00 per annum;

That on said February 16, 1881, their stock in trade amounted to between $9,000.00 and $12,000.00;

That their other assets amounted to between $4,000.00 and $5,000.00, and that their liabilities amount to some $8,000.00;

That their business had been fairly and honestly conducted, and that they had not made any attempt to sell or dispose of the same, or to sell, assign, secrete, or dispose of any of their property with intent to hinder, delay, or defraud their creditors;

65 That they kept a regular bank account, and deposited in said bank their receipts from day to day;

That their creditors generally were not pressing them or insisting upon payment of their mercantile debts;

That defendants, Carson *et al.*, were merchants engaged in doing a general dry-goods business at Chicago, Illinois;

That plaintiffs had been for some time prior to said February, 1881, customers of said defendants to a limited extent;

That all bills incurred by them for goods purchased from said defendants prior to November, 1880, had been paid for;

That in November, 1880, the plaintiffs purchased from defendants goods to the amount and value of some $330.00;

That a statement of the same had been forwarded by said defendants to plaintiffs, but no other or further demand for payment had been made upon plaintiffs, and that prior to and upon said February 16th, 1881, plaintiffs were in good credit and repute, both in the community where they resided and among their mercantile creditors.

Plaintiffs further introduced evidence tending to show that on the 16th day of February, 1881, a writ of attachment was procured by the defendants, Wood & Stiles, who were then attorneys
66 and counsellors-at-law, out of the district court of Chippewa county, Minnesota, upon an affidavit in that regard, which is hereto annexed, and made by defendant Stiles;

That said defendants, Wood & Stiles, as such attorneys and as the attorneys of the defendants, Carson *et al.*, on the 17th day of February, 1881, caused said writ of attachment to be levied upon the entire stock in trade of these plaintiffs, and closed up their store and seized their entire stock in satisfaction of said claim, evidenced by said writ of attachment;

That said writ of attachment, and the action in which the same was issued, was commenced for the recovery of the amount of said bill of goods theretofore sold by said defendants, Carson *et al.*, to these defendants;

That in issuing said writ, said defendants, Wood & Styles, directed the sheriff not to accept from the plaintiffs any money in payment of said claim, or in satisfaction of said writ, but to close up said store, and hold the same under said writ;

That as a result of the levying of this writ of attachment, no previous demand whatever having been made by said defendants, Wood & Styles, for the payment of said claim, the credit of the plaintiffs was so injured and affected that actions were commenced against them by all their other creditors, other writs of attachment
67 sued out and levied, and their entire stock of goods seized, their business broken up, their goods subsequently sold on execution, and that they have never been able to resume business, and that their business was wholly ruined, and that such consequences were caused by said levying of said writ of attachment.

And the plaintiffs also introduced evidence tending to show that the allegations, contained in the affidavit upon which said writ of attachment was sued out, were false, and that the same was as to Wood & Stiles procured maliciously and without probable cause therefor, who were the attorneys of said defendants, Carson *et al.*, of record in said cause in which said writ of attachment was issued.

And thereupon the plaintiffs rested their case.

And thereupon the defendants, Carson *et al.*, introduced evidence tending to show that in November, 1880, they had sold to the plaintiffs the goods aforesaid upon the credit of 60 days.

That at the expiration of said term of credit, said plaintiffs failed to pay for said goods;

That upon the 14th day of February, 1881, said defendants, Carson *et al.*, were informed that said plaintiffs had failed, and thereupon said defendants, Carson *et al.*, communicated by telegraph with said defendant, Wood, at Montevideo, Minnesota, stating the
68 rumor they had heard and enquiring as to its truth;

That upon the receipt of this telegram said defendant, Wood, informed said defendants, Carson *et al.*, by telegraph at Chicago, that said plaintiffs were in a bad way and not likely to last long, and to forward to him the amount of their claim and the names of the persons composing their partnership;

That upon the receipt of said information said defendants, Carson *et al.*, telegraphed to said defendant, Wood, at Montevideo, the amount of their said claim, the names of the persons composing their copartnership, and instructions to secure their said claim at all hazards;

That thereupon, upon receipt of said telegram, said defendants, Wood & Stiles, instituted the action hereinbefore referred to, and caused the issuance and levying of the writ of attachment complained of;

That thereafter the said defendants, Carson *et al.*, were advised by said defendants of the action they had taken, and left the conduct and control of said cause entirely in the hands of said Wood & Stiles.

The testimony on the part of said defendants, Carson *et al.*, tended to show that they had no knowledge whatever relative to the condition of the plaintiffs, save the information received by them that they had failed, and the telegraph of the defendants, Wood

69 & Stiles, that they were in a bad way and could not last long.

That they had no knowledge of the means adopted by said Wood & Stiles to secure or collect said claim until after said attachment was levied, nor did they give them any other or further instructions, prior to the issuing and levying of said attachment, than the aforesaid instructions to secure said claim at all hazards;

That during all of said time said defendants, Carson *et al.*, were in Chicago, and said plaintiffs and said defendants, Wood & Stiles, were at Montevideo, Minnesota.

The testimony on the part of said defendants also tended to show that after they were advised of said attachment they declined to dissolve the same, or to permit the same to be vacated, without the consent of their said attorneys, Wood & Styles, and left the further conduct of said matter wholly in their discretion and judgment.

And thereupon the testimony closed.

At the close of said testimony, upon an inquiry from the court, counsel for plaintiffs moved the court to remand said cause to said district court of Chippewa county, Minnesota, upon the ground that the record showed that said cause had been remanded to this court upon a petition of said defendants, Carson *et al.*, alone;

70 That said defendants, Wood & Stiles, were citizens of Minnesota, and had not concurred in said petition; had not taken any part in the removal of said cause to this court, and had not appeared as defendants in this court, and that said cause had been improperly removed to this court, and the court had no jurisdiction thereof, which motion was denied by the court, to which denial counsel for plaintiffs duly excepted.

And thereupon the court directed the jury to return a verdict in favor of the defendants, Carson *et al.*, upon the grounds that the plaintiffs had failed to establish by their testimony a cause of action against them; to which direction and charge plaintiff duly excepted; and thereupon, under such direction, the jury returned a verdict in favor of the defendants, Carson *et al.* The court directed the case to proceed as to Wood & Stiles, but counsel thereupon declined to do so, and moved to remand the same; which motion was denied. And thereupon counsel for plaintiffs moved to set aside said verdict upon the ground that, the case having been improperly removed to this court, the court had no jurisdiction in the premises, and on the further ground of errors of law contained in said charge directing said verdict, and excepted to by the plaintiffs, and because the foregoing facts do not appear of record in said cause, we

71 have allowed and signed the foregoing bill of exceptions, and make the same of record in said cause.

SAMUEL TREAT, *Judge.*

(Indorsed:) Filed July 15, 1882. H. E. Mann, clerk. Bill of exceptions filed before order setting aside verdict, &c., entered. H. E. Mann, clerk.

72 Supreme Court of United States.

JOHN T. PIRIE, GEORGE SCOTT, ROBERT SCOTT, ANDREW MCLEISH, partners under firm name of Carson, Pirie, Scott & Company, Plaintiffs in Error,

vs.

EVAN J. TVEDT and THOMAS J. TVEDT, Partners as Tvedt Bros., Defendants in Error.

Assignment of Errors.

The plaintiffs in error hereby assign for error in the order remanding said cause, and to reverse which this writ of error is sued out; that this cause was, and is, removable under the second subdivision or clause of the second section of the act of the Congress of the United States, approved March 3, 1875, because the action is an action of tort, which is a severable controversy, and is, so far as the plaintiffs in error and defendants in error are concerned, a controversy which is wholly between citizens of different States, and which can be fully determined as between them.

GORDON E. COLE,
Att'y for Pl'ffs in Error.

(Indorsed:) Filed July 18, 1882. H. E. Mann, clerk.

73 United States Circuit Court for the District of Minnesota.

Term minutes. June term, A. D. 1882. July 18, 1882. Present, Hon. Samuel Treat, judge.

EVAN J. TVEDT *et al.* *vs.* STYLES CARSON *et al.*

And now come the defendants, Styles Carson & Co., by Gordon E. Cole, Esq., their attorney, on whose motion a writ of error to remove this cause to the Supreme Court of the United States is allowed and bond is approved and citation signed.

74 UNITED STATES OF AMERICA, *ss:*

To Evan J. Tvedt and Thomas J. Tvedt, Greeting:

You are hereby cited and admonished to be and appear at a Supreme [Court] of the United States, to be holden at Washington, on the second Monday in October next, pursuant to a writ of error filed in the clerk's office of the circuit court for the United States for the eighth circuit and district of Minnesota, wherein John S. Perie, George Scott, Robert Scott, and Andrew McLeish, partners under the firm name of Carson, Perie, Scott and Company, are plaintiffs in error, and you are defendants in error, to show cause why the order setting aside the verdict and remanding the cause to the district court of the twelfth judicial district of the State of Minnesota in and for the county of Chippewa should not be corrected and reversed and speedy justice should not be done to the parties in that behalf.

Witness the Honorable Morrison R. Waite, Chief Justice of the said Supreme Court of the United States, this 18th day of July, 1882.

[SEAL.] R. R. NELSON,
One of the Judges of the Circuit Court of the United States in and for the District of Minnesota.

75 MINNESOTA, *Ramsey Co.,* } *ss:*

Wm. Ely Bramhall, being first duly sworn according to law, upon his oath says that he served the within citation upon O'Brien & Wilson, the plaintiffs' att'ys herein, on the 18th day of July, 1882, by handing to and leaving a copy of the same with them at their office in the city of St. Paul in said county and State.

WM. ELY BRAMHALL.

Subscribed and sworn to before me, this 18th day of July, 1882.

ALFRED S. HALL,
Notary Public, Ramsey Co., Minn.

Due service of the within citation admitted by copy, this 18th day of July, 1882.

T. F. KNAPPEN &
O'BRIEN & WILSON,
Att'ys for Pl'ffs, Tvedt Bros.

[Endorsed on cover:] Minnesota C. C. U. S. No. 287. John S. Pirie, George Scott, Robert Scott, and Andrew McLeish, partners as Carson, Pirie, Scott & Company, plaintiffs in error, *vs.* Evan J. Tvedt and Thomas J. Tvedt, partners as Tvedt Brothers. Filed 2nd October, 1882.

15-41

Office Supreme Court U. S.
FILED.
NOV 12 1884
JAMES H. McKENNEY,
CLERK.

Supreme Court of the United States,

OCTOBER TERM, 1884.

No. 287.

JOHN S. PERIE, GEORGE SCOTT, ROBERT SCOTT AND ANDREW McLEISH, PARTNERS AS CARSON, PERIE, SCOTT & CO.,

Plaintiffs in Error,

vs.

EVAN J. TVEDT AND THOMAS J. TVEDT, PARTNERS AS TVEDT BROTHERS,

Defendants in Error.

Argument for Plaintiffs in Error.

GORDON E. COLE,

Attorney for Plaintiffs in Error.

ST. PAUL:
H. M. SMYTH PRINTING CO.
1884.

SUPREME COURT

OF THE UNITED STATES.

OCTOBER TERM, 1884.

No. 287.

JOHN S. PERIE, GEORGE SCOTT, ROBERT SCOTT AND
ANDREW McLEISH, PARTNERS AS CARSON, PERIE, SCOTT AND COMPANY,
Plaintiffs in Error,

VS.

EVAN J. TVEDT AND THOMAS J. TVEDT, PARTNERS
AS TVEDT BROTHERS,
Defendants in Error.

BRIEF AND ARGUMENT OF PLAINTIFFS IN ERROR.

The plaintiffs in error assign for error in the order of the United States Circuit Court for the District of

Minnesota, remanding the case to the State Court, (folio 52 Record,) that this cause was and is removable under the second subdivision or clause of the second section of the act of the Congress of the United States, approved March third, 1875, because the action is an action of tort and is a severable controversy; and is, so far as the plaintiffs in error and defendants in error are concerned, a controversy which is wholly between citizens of different States, and which can be fully determined as between them.

In considering this assignment of error, it is to be observed that the plaintiffs, although they join all the defendants in one action, seek to treat their claim in their complaint as joint and several, and ask judgment against the defendants and each of them; (folio 6, Record.) That the resident and non-resident defendants appear by different attorneys and interpose separate defenses and answers. (Folios 15 and 18, Record.)

It is obvious that for the special malice which might actuate the attorneys in Minnesota, their foreign clients (merchants in Chicago) having no knowledge and giving no direction other than to secure their claim, would not be responsible, but would be responsible, for, without probable cause and with malice directing an innocent attorney to attach, so that entirely separate and distinct controversies would exist between the plaintiffs and the two sets of defendants. This appeared sufficiently in the course of the trial where the testimony showed an entirely separate controversy as to the resident and non-resident defendants.

It is not true, as assumed by the defendant in error in his motion after the trial to remand, that Wood and Styles do not appear, or that the trial was not had as between the plaintiff and all the defendants.

As Carson was the first name in the title of the complaint, although no such person was really a party to the suit at all, but that being the defendant Carson, Perie, Scott & Co.'s firm name which they retain although their former partner (Carson) had deceased before the commencement of this action, all subsequent proceedings were so entitled, to-wit, Tvedt et al. vs. Carson et al.; and when nothing appears to qualify this, it means to embrace and does embrace the entire parties to the action.

Thus, the complaint is endorsed, Evan J. Tvedt vs. Styles, Carson et al., (folio 7, Record) The answer of defendants Wood and Styles, (folio 22.) The whole action was removed, both as to the resident and non-resident defendants. See the prayer of the petition (folio 35), and the order of the State Court removing the suit (folio 43); and the order of removal with the record was filed in the office of the clerk of the United States Circuit Court, endorsed, Evan J. Tvedt et al. vs. Styles Carson et al.

In the term minutes under the same title of Evan J. Tvedt et al. vs. Styles, Carson et al., it is stated that this case being reached on the calendar and called, the parties appeared by their respective attorneys, the plaintiff by Messrs. O'Brien & Wilson, and the defendants by Gordon E. Cole and Messrs. Wood & Styles. Wood & Styles were not attorneys for Carson, Perie, Scott & Company, but were their own attorneys, having appeared in person, (see folios 16 and 21, Record.) Whereupon a jury is sworn in the case and testimony taken on both sides, Wood & Styles both being sworn as witnesses, (see page 21, Record;) and Judge Treat, in his decision in which he speaks of the whole case, which he says is against several non-resident defendants, also Wood & Styles, residents, entitles it in the same manner: Tvedt et al. vs. Carson et al.

The bill of exceptions bears the same title and recites that the foregoing *case* came on to be heard upon the record thereof, transferred to this court from the State Court and which record is hereto annexed and made a part hereof. A jury was duly impaneled to try the issues between the plaintiffs and *defendants* (folio 64, Record.) In making up the bill of exceptions the words Carson et al. and Wood & Styles are used to indicate the two sets of defendants as distinguished the one from the other, but wherever used for this purpose the context clearly indicates it.

So that the counsel for the plaintiff in his motion to remand was entirely in error when he based his motion in part upon the false assumption that Wood & Styles had not appeared as defendants in that court, (folio 70), and the court very properly in response directed the action to proceed as against them, both of them having testified in their own behalf, but the *plaintiff's counsel declined to do so;* (folio 70.) This action of the counsel very clearly indicates that the object of joining Wood & Styles was not for the purpose of obtaining judgment against them, but for the purpose of depriving the only defendants against whom they sought a verdict, of the right of removal.

The facts in the case that the action was one of tort and that Wood & Styles were residents, and Carson, Perie, Scott & Company were not residents of the same State with the plaintiffs, were as fully known at the commencement of the trial to court and counsel, for they were all matters of record, as they were at its conclusion; and yet, neither court or counsel made any objection to the jurisdiction of the court until after the trial had been completed so far as the introduction of testimony was concerned, and only when plaintiff's counsel found that his experiment of a trial in the circuit court was likely to fail, and that the court was about to direct a verdict for the defendants, Carson, Perie, Scott & Co., did he finally move to remand.

II.

Even if there is not always a severable controversy in an action of tort, in an action for a malicious attachment when malice and want of probable cause must both be shown by the plaintiff as against each class of defendants, and the liability of the non-resident defendants depends upon tracing home to them approval and adoption of the tortious acts of their agents—that is the controversy as to them; while whether those acts were tortious is the controversy between the plaintiffs and non-resident defendants; and when this has appeared in the progress of the trial, and the action had in fact been determined as a separate controversy as to the non-resident defendants in their favor, leaving the action as against the resident defendants unaffected, it had then appeared if it did not; on the pleadings that the controversy was a severable one, wholly between the plaintiff and the non-resident defendants, and which could be fully determined as between them without the presence of the resident defendants, it had also appeared by the refusal of the plaintiffs to proceed against the resident defendants, that they were merely nominal parties, joined only for the purpose of depriving the non-resident defendants of a right secured to them by act of Congress. The court and plaintiff did not then first discover that there were resident defendants; it is conclusively presumed to have known it from the beginning. To such a state of facts section 5 of the act of March 3, 1875, has no application; that is intended to provide for a collusive and improper removal, then first discovered by the court. "If at any time after removal it shall appear, etc., the Circuit Court shall proceed no further, etc., but shall dismiss or remand," viz., *when it appears.* But here both court and parties proceeded with a full knowledge of all the facts to try the case. This was a waiver of all objection to the jurisdiction.

Davis vs. Lathrop, 13 Federal Reporter, 565, by Wallace, Circuit Judge, in the circuit court of Southern District of New York.

He says, after citing authorities in support of his position that the right to have a case improperly removed or remanded may be waived, notwithstanding the section of the statute referred to:

> "Upon analogy and principle it should be held that the party loses his right to object to the removal of an action when it has been removed on the ground of diverse citizenship of the parties by going to trial and trying the same without raising the objection.
>
> "Cases may arise in which the real character of the controversy is not made manifest until the trial. The section is for the protection of the court as well as the parties against fraud upon its jurisdiction."

DeWolf vs Rabaud
1 Peters 476
DeSobry vs Nicholson
3 Wallace 420.

The case of *Williams v. Notawa, 104 U. S. 209,* illustrates the character of cases, which are within the purview of section 5 of the act of 1875, and the Court states its object as above; but the present case is within neither its letter or spirit.

The court below in its decision remanding the case, and setting aside the verdict for the purpose of remanding it, (see Tvedt v. Carson, 13 Federal Reporter 353,) and which decision is also printed in the record, gives what he regards as a forcible reason why the action was not removable.

He says (folio 62, Record): "In the progress of the suit it is judicially determined on the merits that no cause of action exists against the non-residents, leaving the case to be further pursued solely between resident plaintiffs and resident defendants. The case thus became split into two parts, to be continued in a *forum* which had no jurisdiction of the remaining parties if they had originally been the sole parties."

But this argument is based on a slight irregularity which could have been instantly corrected; the court ought to have submitted the case as to both sets of defendants to the jury coupled with a direction to return a verdict for the non-resident defendants and for or against the resident defendants as they might find the facts.

But with the jury still in the box he directed the case to proced as to the resident defendants, and could have sent the jury out with directions to add that finding to their verdict. This the defendants, Wood and Styles, consented to in open court (folio 55, Record); and it was alone prevented by the conduct of plaintiff's counsel in declining to ask or accept a verdict against them (folio 70, Record).

This was all before the motion to remand, and by this action which was equivalent to a dismissal or discontinuance of the action as to the resident defendants, he surely eliminated them from the case, so that when he moved to remand parties which his own conduct had shown to have been merely nominal in the beginning were no longer parties at all.

It is said in support of the argument for remanding that a party has the right in cases of tort to elect a joint remedy; and when he does so, by that election the controversy becomes one which cannot be tried without the presence of all the defendants, and hence does not present a federal controversy.

But surely such election, to have such effect, must be in good faith. When he seeks no verdict against the resident defendants the argument loses all force if it ever had any.

III.

But torts are several and not joint; there is no contribution among *tort feasors*—a several and separate cause of action and controversy exists against each defendant for his own wrong and participation in the tort unaffected by that of any other person.

It is always at the election of the plaintiff to make persons parties who are proper but not necessary parties; but if they are only proper parties but not necessary, it does not defeat the right of removal even if they are residents of the same State with the plaintiff.

Whatever else was held in *Barney vs. Latham*, this at least was held, that proper but not necessary parties resident of the same State with the plaintiff, would not prevent a removal.

Barney vs. Latham, 103 U. S. 205; and it is the uniform holding of this court,—see *Bacon vs. Rives, 106 U. S. 104.*

The most that can be said of the joinder of the attorneys Wood & Styles with their principals, Carson, Perie, Scott & Co., in an action against the latter for a malicious attachment, is that they were proper but not necessary parties to the action.

Ruple vs. Hyde, 104 U. S. Rep. 407, did not in the least modify or qualify the doctrine of *Barney vs. Latham*.

It was an action on a joint contract entered into by an alleged partnership. The resident defendant was the managing partner, and the issues were whether the non-resident copartners were copartners with him, and whether the contract had been performed; and the contention of the non-resident defendants was that by reason of some loose language in the pleadings it was an action of tort and hence removable. The case seemingly turned on that, for the court say:

> "The action is clearly one sounding in contract and not in tort. All the allegations of wrongful conversions are immaterial and in no way change the character of the suit. The suit, as it stands on the complaint, is in respect to a controversy between the parties as to the liability of the defendants on a single contract."

Judge Nelson of the United States Circuit Court of Minnesota, had decided prior to Judge Treat's decision in the case at bar, that where an action is brought against a resident and non-resident defendant sounding in tort, and each is liable as a wrong doer, the plaintiff cannot by joining the non-resident defendant with the resident, debar the former from asserting a right given him by the act of 1875.

Clark vs. Chicago, Mil. & St. Paul R'y Co.
Sweet's Adm'rs vs. same, 11 Federal Reporter, 355.

In June, 1883, long after the decision of the supreme court in Hyde vs. Ruple, Judges Harlan, Drummond and Blodgett all concurring, held, that in an action of tort when as in this case the defendants interposed separate pleas, a non-resident joined with a resident might remove the action, and they say:

"In all the cases which have been decided where one or more of the defendants were citizens of the same State with the plaintiff and one or more were not, and it has been held that the cause could not be removed, it has been held that all of the defendants were *indispensable* parties."

Kerling vs. Cotzhausen, 16 Fed. Reporter, 705.

In the Southern District of New York the question had been decided the other way, basing the decision on the idea that plaintiff having elected to sue jointly, had converted a several into a joint controversy, and could not be defeated in his election by removal. He is not. The whole case is removed, and his election has no greater effect than when he elects to make proper but not necessary parties to a *bill.* It cannot defeat the right of the necessary parties to remove. It must be remembered that they have rights as well as he—they to remove, he to join other parties with them who cannot remove.

In *Boyd vs. Gill, 19 Fed. Rep., 145*, the Circuit Court of the Southern District of New York reviewed these decisions, and while not reversing them, in which it seemed to rely greatly on Judge Treat's decision in the case at bar, it nevertheless sustained a removal by one non-resident trustee charged with fraud in conjunction with resident trustees upon a distinction which does not seem to be very satisfactory. One reason given for sustaining the removal there, is exactly applicable here. It says: "The plaintiff at his election can dismiss his bill as against all the other defendants at any stage of the action and proceed against the non-resident defendant alone and obtain against him the complete relief to which he would be entitled if the other defendants were joined." This plaintiffpractically did by refusing to accept a verdict against the resident defendants.

The case of Barney vs. Latham goes very much further than it is necessary to go in this case.

It was a bill in equity to reach property which it was alleged had been obtained from the complainant by fraud, in the hands of various parties, some resident and some non-resident, into whose hands it had gone, they being chargeable with notice of the original fraud. And it was held that the controversy between the complainant and the non-resident defendants into whose hands a portion of the property had gone was sufficient to justify removal; thus holding that one single controversy, however small, wholly between non-resident parties, would draw the whole case, although there was another and perhaps more important controversy between residents of the State, upon the theory that the parties to the latter controversy, while perhaps proper, were not necessary parties to the suit.

If this conclusion is correct, the case is sound in principle and in accordance with the uniform decisions of the court, and is an authority in support of the right to remove the case at bar, whether the theory referred to is correct or not.

If there is any error in the decision of that case I think it will be found to be in the assumption that when a bill is filed to set aside a conveyance on the ground of fraud and seeks a restoration of the property, that all the purchasers to whom the fraudulent parties may by separate conveyances have transferred portions of the property, they being chargeable with notice of the original fraud, are not necessary parties.

See *Story on Equity Pleadings, sec. 76a, 5th ed.*

That the presence of Wood and Styles was not *necessary* to the determination of the controversy between plaintiff and Carson, Perie. Scott & Co. is not debatable; this is the test.

See *Walden v. Skinner, 11 Otto, 577-589.*

GORDON E. COLE,
Att'y for Plaintiffs in Error.